

TPB Information Sheet

TPB(I) 23/2014

Sufficient number requirement for partnership and company registered tax (financial) advisers

Disclaimer

This is a Tax Practitioners Board (TPB) Information sheet (TPB(I)). It is intended to be for information only. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers in the *Tax Agent Services Act 2009* (TASA).

In addition, please note that the principles and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law. Please refer to the TASA for the precise content of the legislative requirements.

Document history

The TPB released this document as a draft Information sheet in the form of an Exposure draft on 24 September 2014. The TPB invited comments and submissions in relation to the information in it. The closing date for the submissions was 24 October 2014. The TPB considered the submissions made and published the TPB(I) on 23 December 2014.

On 26 March 2018, the TPB updated this TPB(I) to:

- delete obsolete references to different registration pathways and corresponding timeframes (including notification and transitional options)
- provide additional guidance for Australian financial services licensees.

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Introduction

1. All partnerships and companies seeking registration or renewal of registration as a tax (financial) adviser need to meet the sufficient number requirement. This means that these entities will need to have a sufficient number of individuals, being registered tax agents or registered tax (financial) advisers, to provide tax (financial) advice services to a competent standard, and to carry out supervisory arrangements.¹
2. This TPB Information Sheet (TPB(I)) has been prepared by the TPB to assist entities in understanding the TPB's approach to the sufficient number requirement.
3. Whether a particular partnership or company satisfies the sufficient number requirement is a question of fact. This means that each application for registration or renewal will need to be considered on a case-by-case basis having regard to the entity's facts and circumstances.

Sufficient number requirement

Legislative background

4. Partnerships and companies seeking registration or renewal of registration as a tax (financial) adviser will need to meet all the standard eligibility criteria under section 20-5 of the *Tax Agent Services Act 2009* (TASA).
5. Under subparagraphs 20-5(2)(c)(iii) and 20-5(3)(d)(iii) of the TASA, one of these standard eligibility criteria is that the partnership or company has:
 - (iii) in the case of registration as a registered tax (financial) adviser—taking into account the requirements of paragraphs 912A(1)(d) to (f) of the *Corporations Act 2001*, a sufficient number of individuals, being registered tax agents or registered tax (financial) advisers, to provide tax (financial) advice services to a competent standard, and to carry out supervisory arrangements.

¹ It is noted that partnerships and companies do not need to meet the sufficient number requirement for the purposes of registration under the notification option or transitional option under Items 49 and 50 in Schedule 1 to the *Tax Laws Amendment (2013 Measures No. 3) Act 2014* respectively.

6. Paragraphs 912A(1)(d) to (f) of the *Corporations Act 2001* provide that²:
- (1) A financial services licensee must:
 - (a) ...
 - (d) unless the licensee is a body regulated by APRA--have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and
 - (e) maintain the competence to provide those financial services; and
 - (f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and
 - (j) ...

Who can form the sufficient number?

7. The registered individual tax agents and tax (financial) advisers that a company or partnership is required to have, for the purpose of satisfying the sufficient number requirement, is unique and can be wide-ranging having regard to the company or partnership's particular circumstances. The individuals may include partners, directors, employees, contractors and staff provided under a service trust arrangement³. Further, these individuals may also include the financial services licensee's representatives,⁴ responsible managers, compliance officers and regional/line managers.

Meaning of 'competent standard' and 'supervisory arrangements'

8. The phrases 'competent standard' and 'supervisory arrangements' are not defined in the TASA. As a result they take on their ordinary meaning and are broadly considered to be arrangements aimed at directing, overseeing and checking the tax (financial) services performed on behalf of a registered tax (financial) adviser to ensure those services are provided competently.

Competent standard

9. The Macquarie Dictionary (2009) provides the following definition:

Competent

1. Properly qualified; capable
2. Fitting, suitable or sufficient for the purpose; adequate.

² For more information in relation to the requirements under subsection 912A(1) of the *Corporations Act 2001*, refer to the Australian Securities and Investment Commission's Regulatory Guide *RG105 Licensing: Organisation competence*.

³ See paragraph 2.56 of the Explanatory Memorandum to the Tax Agent Services Bill 2008.

⁴ 'Representatives' has the meaning given by paragraph (a) of the definition of that expression in section 910A of the *Corporations Act 2001*.

10. Further, the Code of Professional Conduct contained in section 30-10 of the TASA provides some guidance in relation to the meaning of competence. In particular, subsections 30-10(7) to (10) of the TASA, which all fall under the key principle of 'competence', require that tax (financial) advisers must:
- ensure the tax (financial) advice services they provide, or are provided on their behalf, are provided competently
 - maintain knowledge and skills relevant to the tax (financial) advice services they provide
 - take reasonable care to ascertain clients' state of affairs
 - take reasonable care to ensure that taxation laws are applied correctly.

Supervisory arrangements

11. The Macquarie Dictionary (2009) provides the following definitions:

Supervise

1. to oversee (a process, work, workers, etc) during execution or performance; superintend; have the oversight and direction of.

Supervision

1. the act or function of supervising; oversight; superintendence.

12. Further, the TPB is of the view that the following considerations may be relevant in determining whether there are appropriate supervisory arrangements in place:
- the level and depth of oversight over the provision of tax (financial) advice services by staff. While it is not necessary that all work or client interviews be monitored, a substantial degree of oversight (which may or may not include physical)⁵ of the staff and what they do is necessary and this will vary according to the skills and experience of the staff and the complexity of the tax (financial) advice service being provided
 - periodic and 'spot' checks of relevant financial advice material, such as Statement of Advice, prepared by staff
 - quality assurance mechanisms such as conducting regular audits of work performed or undertaken by staff
 - the degree of control exercised by a tax (financial) adviser over the way in which staff carry out their work.

⁵ This recognises those practices that may be geographically dispersed and where face-to-face supervision will not always be a viable option.

Determining the 'sufficient number'

13. There is no set formula for determining the sufficient number of registered individual tax agents or tax (financial) advisers a partnership or company is required to have to satisfy this requirement.
14. However, the TPB will take into account the requirements of paragraphs 912A(1)(d) to (f) of the *Corporations Act 2001*, which relate to:
 - having available adequate resources (including financial, technological and human resources) to provide the financial services covered by the license and to carry out supervisory arrangements
 - maintaining the competence to provide those financial services
 - ensuring that its representatives are adequately trained, and are competent, to provide those financial services
15. In addition to those requirements under the *Corporations Act 2001*, the TPB will also take into account other factors, including:
 - size of the business (for example, turnover, number of clients and number of relevant staff)
 - the types of tax (financial) advice services being offered
 - number of qualified and experienced staff
 - the frequency of appropriate training and development activities for all relevant staff
 - the level (and type) of technology or software used
 - the supervisory arrangements (for example, quality control practices and escalation procedures) in place
 - any conditions imposed by the TPB on the entity's registration based on the qualifications and experience of its staff.⁶

⁶ Some of these factors are taken from paragraph 2.56 of the Explanatory Memorandum to the Tax Agent Services Bill 2008.

16. The TPB recognises that the business models and structures in the financial services industry are different to those commonly found with tax and BAS agents. This is in part due to the licensing requirements under the *Corporations Act 2001*. Existing business models and structures in the financial services industry that the TPB is aware of include:

- licensees with multiple practices operating under one licence
- licensees operating with authorised representatives only (which may include corporate authorised representatives and/or individual authorised representatives), employee representatives only or a combination of both
- licensees with a small number of representatives operating a salaried advice business
- corporate authorised representatives authorised by one of the above licensee structures
- authorised representatives, often as sole traders, operating a financial planning business under the license of a larger licensee.

17. Taking into account the different business models and structures outlined in paragraph 16 and the numerous combinations in relation to the factors listed in paragraph 15, the TPB is of the view that it is ultimately a matter for the partnership or company to satisfy the TPB that it meets the sufficient number requirement. In particular, the TPB is of the view that partnerships and companies are best placed to assess how many registered individual tax agents or tax (financial) advisers their business requires to ensure that tax (financial) advice services are provided competently and to ensure there are supervisory arrangements in place.⁷

⁷ The requirement for a partnership or company to demonstrate to the TPB that it meets the sufficient number requirement applies even if all employees of the partnership or company are registered because the TPB will still require details of each of the employees.

18. However, the TPB provides the following additional guidance for AFS licensees:

- a. *AFS licensee operates under a corporate authorised representative or individual authorised representative business model only*

An AFS licensee's sufficient number requirement will be met where every entity under that licensee that is required to be registered with the TPB is registered. This means every corporate authorised representative and every individual authorised representative that provides tax (financial) advice services for a fee or reward is registered with the TPB⁸. In this situation, each individual authorised representative and those individuals who make up the sufficient number requirement for their respective corporate authorised representative will form and satisfy the AFS licensee's sufficient number requirement.

This is because all those individuals should already be registered with the TPB as they are providing tax (financial) advice services for a fee or reward.

This approach should not result in the AFS licensee having to register more individuals to assist in satisfying their sufficient number requirement.

Example

ABC Pty Ltd is an AFS licensee and operates a business model which comprises of five corporate authorised representatives and three sole trader individual authorised representatives (all of which provide tax (financial) advice services for a fee or reward). ABC Pty Ltd does not have any employee representatives.

In this situation, ABC Pty Ltd's sufficient number requirement will be met through all of:

- the individuals that make up the corporate authorised representatives sufficient number; and
- the sole trader individual authorised representatives⁹.

Given who will comprise the sufficient number requirement for ABC Pty Ltd, ABC Pty Ltd should not have to register any additional individuals to assist in satisfying their sufficient number requirement. However, should one of ABC Pty Ltd.'s corporate authorised representatives or sole trader individual authorised representatives no longer be registered with the TPB (and continue to provide tax (financial) advice services, on behalf of ABC Pty Ltd, for a fee or reward), ABC Pty Ltd will no longer meet the sufficient number requirement. In that case, the AFS licensee must notify the TPB of this and advise how they will meet the sufficient number requirement going forward. This information will then be considered by the TPB.

⁸ This does not include individuals who are not providing tax (financial) advice services in their own right, but instead are providing, under a supervisory model, tax (financial) advice services on behalf of another registered tax (financial) adviser.

⁹ As these authorised representatives are sole trader individuals, they do not need to meet the sufficient number test for their own registration (regardless of whether they have employees or not). However, the sole trader individuals will form the sufficient number requirement for their AFS licensee only.

- b. *AFS licensee operates under a business model that includes employee representatives and authorised representatives (individuals and/or including corporate authorised representatives)*

Where an AFS licensee operates a business model that includes employee representatives and/or authorised representatives (individuals and/or including corporate authorised representatives) that are not all registered with the TPB, the sufficient number requirement for the AFS licensee must be met through individuals within the AFS licensee structure itself.

Example

123 Pty Ltd is an AFS licensee and operates a business model which comprises of 20 employee representatives and four sole trader individual authorised representatives. The employee representatives all provide tax (financial) advice services on behalf of 123 Pty Ltd and the sole trader individual authorised representatives also provide tax (financial) advice services for a fee or reward.

In this situation, 123 Pty Ltd.'s sufficient number requirement will need to be met through individuals within the AFS licensee structure itself. This includes partners, directors, employees, contractors and staff provided under a service trust arrangement. Further, these individuals may also include the AFS licensee's employee representatives, responsible managers, compliance officers and regional/line managers. However, these individuals must meet the 'competent standard' and 'supervisory arrangements' requirements as referred to in paragraph x and y.

The fact that the four sole trader individual authorised representatives are already registered with the TPB with a relevant considering in determining how many individuals within 123 Pty Ltd's structure will make up the licensee's sufficient number requirement.

19. Having regard to the information in this TPB(I) (particularly paragraphs 15 and 16), when a partnership or company seeks registration or renewal of registration with the TPB, we will ask the applicant the following types of questions on their application form:
- Does your company/partnership have a sufficient number of registered individual tax agents or tax (financial) advisers to provide tax (financial) advice services to a competent standard and to carry out supervisory arrangements?
 - How many registered individual tax agents or tax (financial) advisers does your company/partnership have?
 - Provide details of supervisory arrangements in place for ensuring tax (financial) advice services are provided competently, for example: size of practice, number and experience of relevant staff (including representatives), how supervision and control is conducted.
20. We will then review the responses to the above questions, and in most cases, accept the information provided by the applicant. However, where a potential issue or discrepancy arises, we will contact the applicant for further information.